BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DONALD L. ELLIOTT	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,027,564
ELLIOTT, DONALD L. & FREEMAN, DAVID,	)	
d/b/a **AAA STONE**[1]	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INDEMNITY COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant and respondent appeal the June 24, 2010, Award of Administrative Law Judge Marcia Yates Roberts (ALJ). Claimant was found to have suffered an accidental injury on July 13, 2005, which arose out of and in the course of his employment with respondent. Claimant was awarded a permanent partial functional disability of 25 percent to the whole body based on an average weekly wage of $625.00. Claimant was also found to have suffered a permanent partial general disability (work disability) of 90 percent based upon a wage loss of 100 percent and a task loss of 66 percent. (The parties acknowledged at the oral argument to the Board that the calculations of the ALJ were incorrect. Any mathematical errors will be corrected in the final calculations of the Board, if appropriate.)

Claimant appeared by his attorney, Mark E. Kolich of Lenexa, Kansas. Respondent and its insurance carrier appeared by their attorney, Samantha Benjamin-House of Kansas City, Kansas. Due to the retirement of Board Member Carol Foreman, E. L. Lee Kinch was appointed as Board Member Pro Tem to serve in her place.

The Appeals Board (Board) has considered the record and adopts the stipulations contained in the Award of the ALJ. The Board heard oral argument on December 8, 2010.

[1] There is confusion in the record as to the relationship between claimant and his stepson. Claimant testified that the partnership ended prior to the date of the accident which occurred on July 13, 2005, but there are documents in the record which dispute that.

ISSUES

1. Did claimant suffer personal injury by accident which arose out of and in the course of his employment with respondent? Respondent argues that claimant was on a personal errand, frolic or deviation from his normal job duties when he was injured. Claimant argues that the activities which led to the injuries were normal activities of claimant's multi-task job.

2. What was claimant's average weekly wage on the date of accident? Respondent argues that the record is saturated with a multitude of figures provided by claimant, all contradictory. Therefore, claimant's testimony is not credible and no average weekly wage has been proven. Claimant testified that the information provided is uncontradicted and provides sufficient information for an average weekly wage to be calculated.

3. What is the nature and extent of claimant's injuries and disability? Claimant argues that he is permanently and totally disabled from the injuries on July 13, 2005. Respondent argues that the medical evidence in this matter supports a finding that claimant is able to return to work and earn at least 90 percent of claimant's pre-injury average weekly wage. Therefore, claimant should be limited to his functional impairment. If claimant is entitled to a work disability, the task loss opinion of board certified orthopedic surgeon and claimant's treating physician, Glenn M. Amundson M.D., would be the most credible. The parties stipulated at oral argument to the Board that, if a permanent award is proper, claimant has a 10 percent whole person functional impairment which preexisted this accident. Respondent would be entitled to a credit in that amount, pursuant to K.S.A. 2005 Supp. 44-501(c).

During oral argument to the Board, claimant's attorney acknowledged that the issue dealing with a lien for Missouri HealthNet payments had not been properly determined by the ALJ. It was requested that this matter be remanded to the ALJ on this issue.

FINDINGS OF FACT

Claimant had worked in the masonry business for several years (from the early 1970s until about 1995), performing masonry work. At that time (in about 1995), claimant quit doing that type of work for a while. Then in 1996, claimant reopened his masonry business. It was called AAA Stone (respondent). Claimant initially was the sole owner of respondent, but by 2005, he had entered into an arrangement where he and his stepson,

David Freeman, jointly owned respondent.[2] On August 26, 2003, claimant was working in the back of his pickup when the straps on the tailgate broke, causing the tailgate to fall several inches. This work-related injury resulted in back surgery from which claimant made a good recovery. The parties stipulated that claimant suffered a permanent impairment from this accident of 5 percent to the whole person. Additionally, claimant has a history of back problems stemming from an accident and surgery in 1996, when claimant underwent an L5-S1 hemilaminectomy and diskectomy with Dr. Arnold Schoolman. For that injury and resulting surgery, the parties agreed that claimant had a permanent impairment of 5 percent to the whole person. These two injuries result in the preexisting 10 percent whole person impairment stipulated to by the parties in this matter.

Claimant continued to work for respondent as a mason, although, according to claimant, his low back symptoms gradually worsened. By July 13, 2005, claimant was experiencing low back pain to the extent that he was required to take pain medication regularly. On July 13, 2005, while unloading copper from the back of his truck at a local junk yard, claimant suffered another injury when the tailgate to his truck again gave way. This accident again caused claimant to experience severe pain in his low back. The July 13, 2005, accident is the subject of this litigation.

The dispute in this matter centers around claimant's salvaging of copper wire from the various job sites where he worked. The wire was gathered at the job sites by either claimant or respondent's workers. It was then hauled by claimant to the junk yard, and the proceeds from the sale were used to put gas in the company truck that claimant drove or to buy beer for respondent's employees. Respondent argues that the salvaging of copper wire was not part of the normal tasks claimant performed for respondent. Claimant acknowledged that AAA Stone was a masonry business. However, he also testified that he would do anything he could to make money. Additionally, the proceeds from the sale of the copper were for the benefit of respondent as these proceeds either bought gas for the company truck or beer for respondent's employees. Respondent argues that claimant's testimony regarding the use of the proceeds is disingenuous, as claimant and his stepson had a significant falling out when claimant learned that the stepson was using business profits to pay his personal bills and to buy gas for his personal vehicle. Claimant's response is that his purchases were for the benefit of respondent, while his stepson's purchases were a personal benefit.

The stepson did not testify in this matter. Additionally, claimant testified that just prior to the accident date, he and the stepson parted company and claimant became the sole owner of respondent. However, respondent's exhibit B to the regular hearing,

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[2] Claimant testified that sometime around 2001 or 2002, claimant brought on a partner into the business. That partner was his stepson, David Freeman. The partnership dissolved July 15, 2005. At the time of August 10, 2006, preliminary hearing, claimant was the sole owner of respondent. Claimant has not been back to work for respondent since the surgery which was performed January 31, 2008. Claimant has sold all of his equipment, and AAA Stone is no longer in business.

which is an audit document, indicates that claimant and David Freeman, claimant's stepson, were partners in the ownership of respondent, with a partnership dissolution on or about July 15, 2005. Respondent's exhibit B also shows the purpose of the partnership to be masonry work. The recycling of copper wire is not mentioned.

Respondent's exhibit B also indicates that respondent has no direct employees, which appears to contradict claimant's testimony. Respondent's exhibit C to the regular hearing, which is a payroll records document, lists several persons who may be employees or independent contractors working for respondent. Respondent's exhibit C also lists payroll in excess of $20,000.00, which would support claimant's contention that respondent had actual employees.

Wage records on claimant were not placed into this record. Claimant testified that Mr. Freeman had control of the wage records, and Mr. Freeman did not testify. Claimant did state that he was making $1,380.00 per week which, after taxes, resulted in a weekly payment of $1,000.00. Claimant went on to testify that since he was unable to work every week due to the weather, he actually earned between $30,000.00 and $35,000.00 per year. The ALJ found that claimant earned a salary of $32,500.00 per year, which resulted in an average weekly wage of $625.00. As noted above, Mr. Freeman did not testify and actual wage and tax records are not in this record. However, respondent's exhibits B and C to the regular hearing seem to indicate that claimant was earning no money for his labors for respondent.

Claimant's employment and injury history are significant. Claimant originally owned his own masonry business from the early 1970s until 1995. Claimant then went to work for Clearfield Cheese (Clearfield), handling 90-pound boxes of cheese. Claimant suffered a significant injury with Clearfield, which resulted in surgery to claimant's low back. This resulted in the first 5 percent preexisting whole body impairment, as noted above. In approximately 1996, claimant returned to masonry work, opening AAA Stone. Claimant's stepson, David Freeman, was brought into the business as a partner in either 2001 or 2002. In August 2003, claimant suffered another low back injury when claimant was loading blocks into his truck. The tailgate of the truck gave way, causing claimant and the tailgate to drop about 5 inches. The jolt to claimant's back led to medical treatment and a series of three steroid injections under the care of Bradley M. Townsend, M.D., claimant's family doctor. Claimant continued to work at his normal labors for respondent. However, his back continued to worsen over time. This resulted in the second 5 percent whole body preexisting functional impairment stipulated to by the parties pursuant to K.S.A. 44-501(c). Then, on July 13, 2005, claimant suffered the accident and resulting injuries which are in dispute herein.

Claimant came under the care of Dr. Amundson on October 11, 2006. Dr. Amundson diagnosed claimant with low back pain with radiculopathy into claimant's lower extremities. Due to limited medical records from claimant's past, and due to the ongoing pain symptoms, Dr. Amundson requested a more current MRI of claimant's low

back. Claimant was later diagnosed with severe degenerative changes at L4-5 and L5-S1. Surgical intervention was suggested as a possible treatment, and claimant underwent an L4-5 and L5-S1 anterior interbody cage fusion with plate on January 31, 2008, under Dr. Amundson's care. Dr. Amundson's medical reports indicated that claimant's surgery was successful. However, claimant remained in significant pain and required high levels of narcotics.

By July 25, 2008, claimant was improved to the point that he was released by Dr. Amundson with restrictions that claimant work at a medium physical demand level. This would allow claimant to occasionally lift from 20 to 50 pounds and occasionally bend, squat, kneel and twist. While Dr. Amundson released claimant on a PRN basis, he noted in his report of September 9, 2008, that claimant remained on medications with a "continuing need".[3] After reviewing a task list created by vocational expert Mary Titterington, Dr. Amundson determined that claimant could no longer perform 11 of the 18 tasks on the list for a 61 percent task loss. On cross-examination, Dr. Amundson acknowledged that Task 18 was "possibly" beyond claimant's ability to perform. This would raise the task loss to 67 percent.[4]

Claimant was assessed a 10 percent whole person functional impairment pursuant to the fourth edition of the AMA *Guides*.[5] Of that 10 percent, Dr. Amundson opined that 50 percent was attributable to the 2005 accident and 50 percent was preexisting. However, in his report of November 19, 2006, Dr. Amundson had stated that the 2003 accident represented a 20 percent aggravation of claimant's symptoms and the 2005 accident represented an 80 percent aggravation of claimant's symptoms.

Dr. Amundson acknowledged that he was unaware that claimant was again placed on Duragesic (Fentanyl) patches which are reserved for the treatment of rather intense pain. Claimant had also been recommended for a spinal cord stimulator for pain management. Dr. Amundson also agreed that pain would have an impact on a person's ability to work.

Claimant was referred by his attorney to board certified emergency medicine and occupational medicine specialist P. Brent Koprivica, M.D., for an examination on August 27, 2008. Dr. Koprivica diagnosed claimant with failed back syndrome and assigned him a 35 percent whole person impairment pursuant to the fourth edition of the AMA *Guides*.[6] Claimant was using six to eight hydrocodone daily and was unable to sit

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[3] Amundson Depo. at 17.

[4] Ibid. at 24.

[5] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[6] AMA *Guides* (4th ed.).

for more than two hours at a time. Claimant also continued to experience radiating symptoms down his left leg. Of the 35 percent impairment, claimant was assigned a 5 percent impairment for the 2003 accident and 5 percent for the preexisting back problems before 2003. This left a 25 percent whole person impairment for the 2005 accident and resulting injuries. Claimant was restricted to lifting up to 50 pounds on a one-time basis and occasional lifting to 30 pounds or less. Claimant should avoid frequent or constant squatting, crawling, kneeling or climbing. Standing and walking intervals would be limited to less than thirty minutes, with the flexibility to sit whenever necessary. Dr. Koprivica opined that, of the 18 tasks on Mary Titterington's list, claimant was unable to perform 14, which results in a task loss of 78 percent.

Dr. Koprivica testified that claimant, having failed back syndrome, wearing a Duragesic patch and needing six to eight hydrocodone per day, is realistically unable to return to work. Claimant testified that the pain medication causes him to have memory deficits, affects his ability to concentrate and makes him drowsy. In Dr. Koprivica's opinion, claimant was permanently and totally disabled from engaging in substantial gainful employment.

Claimant was referred to vocational expert Mary Titterington on October 13, 2008. Ms. Titterington assessed claimant's past job tasks and provided the list utilized by both Dr. Amundson and Dr. Koprivica. After reviewing claimant's job history and educational history, Ms. Titterington determined that claimant could perform jobs such as night desk clerk or self-service gas station attendant. She opined that these jobs do exist in claimant's geographical area and would pay from $7.00 to $7.50 per hour. Ms. Titterington did express concern about the amount of narcotic medication claimant was required to use for ongoing pain. She termed this a "major concern".[7] She testified that the narcotic medication would affect claimant's ability to concentrate and focus. Additionally, claimant would probably not pass a pre-employment physical drug screen. Martin V. Thai, M.D.'s report, which Ms. Titterington reviewed, indicated claimant's use of medications had increased, with talk of a possible spinal cord stimulator. She described the medications as being level 3 narcotics. After reviewing the medical reports of claimant's family physician, Dr. Townsend, and pain management specialist Dr. Thai, Ms. Titterington determined that claimant is not realistically able to become employed in the open labor market.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[8]

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[7] Titterington Depo., Ex. 2.

[8] K.S.A. 2005 Supp. 44-501 and K.S.A. 2005 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[9]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[10]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[11]

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[12]

Claimant testified several times in this matter before the ALJ. Claimant's testimony regarding the reasons for obtaining and selling the copper is supported by this record. The Board finds that claimant has proven that he suffered an accidental injury which arose out of and in the course of his employment with respondent. The sale of the copper was not a personal errand, frolic or major deviation, but was, instead, a normal activity of claimant's job. The proceeds from the sale of the copper were used for the benefit of respondent.

Claimant testified on several occasions regarding the amount of compensation he was receiving from respondent. The documents which would support or rebut this

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[9] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[10] K.S.A. 2005 Supp. 44-501(a).

[11] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[12] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

testimony were, apparently, in the possession of Mr. Freeman, claimant's stepson. Either party could have subpoenaed these documents or deposed Mr. Freeman. Neither party did so. Therefore, the testimony provided by claimant is the best evidence in this record. The Board finds that the determination by the ALJ that claimant earned $32,500.00 per year is the best evidence of claimant's average weekly wage in this matter. This results in a weekly wage of $625.00. The Board adopts this as its finding and affirms the ALJ's award on this issue.

K.S.A. 44-510e, in defining permanent partial general disability, states that it shall be:

> . . . the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment.[13]

K.S.A. 44-510c(a)(2) states:

> Permanent total disability exists when the employee, on account of the injury, has been rendered completely and permanently incapable of engaging in any type of substantial and gainful employment. Loss of both eyes, both hands, both arms, both feet, or both legs, or any combination thereof, in the absence of proof to the contrary, shall constitute a permanent total disability. Substantially total paralysis, or incurable imbecility or insanity, resulting from injury independent of all other causes, shall constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.[14]

The nature and extent dispute centers around claimant's ability to obtain work, post injury. Here, claimant has been rated and restricted by both Dr. Amundson and Dr. Koprivica. Both expressed concern regarding the amount of narcotic medication claimant was required to take for his ongoing pain. Dr. Koprivica went so far as to opine that claimant was unable to obtain work in the open labor market and was, in fact, permanently and totally disabled. Ms. Titterington, the only vocational expert to testify in this matter, determined that, while claimant had the physical ability to obtain a job, his significant use of high levels of narcotic medication made it unrealistic to assume that claimant would be able to find a job. She determined that claimant was realistically

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[13] K.S.A. 44-510e.

[14] K.S.A. 44-510c(a)(2).

unemployable.[15] The Board finds that claimant has proven that he is permanently incapable of substantial and gainful employment. The Award of the ALJ will be modified accordingly.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to find that claimant is permanently and totally disabled as a result of the accident on July 13, 2005. In all other regards, the Award of the ALJ is affirmed insofar as it does not contradict the findings and conclusions contained herein.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Marcia Yates Roberts dated June 24, 2010, should be, and is hereby, modified to find that claimant is permanently and totally disabled as the result of the accident on July 13, 2005. The Award is affirmed in finding that claimant suffered an accidental injury which arose out of and in the course of his employment with respondent on July 13, 2005, and had an average weekly wage of $625.00 on that date.

WHEREFORE, AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Donald L. Elliott, and against the respondent, AAA Stone, and its insurance carrier, Travelers Indemnity Company, for an accidental injury which occurred on July 13, 2005, and based upon an average weekly wage of $625.00.

Claimant is entitled to 25.14 weeks temporary total disability compensation at the rate of $416.69 per week or $10,475.59, followed by permanent total disability compensation at the rate of $416.69 per week not to exceed $125,000.00 for a permanent total general body disability. Pursuant to the stipulation of the parties, the award will be reduced by $16,871.78, representing the 10 percent permanent partial disability credit under K.S.A. 44-501(c).

As of December 21, 2010, there would be due and owing to claimant 25.14 weeks of temporary total disability compensation at the rate of $416.69 per week in the sum of $10,475.59, plus 258.72 weeks of permanent total disability compensation at the rate of $416.69 per week in the sum of $107,806.04, for a total of $118,281.63. After reducing the award by the 10 percent preexisting disability of $16,871.78, the total due and owing

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[15] *Wardlow v. ANR Freight Systems*, 19 Kan. App. 2d 110, 872 P.2d 299 (1993).

is $101,409.85, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of $6,718.37 shall be paid at $416.69 per week until fully paid or until further order of the Director.

This matter is remanded to the ALJ for a determination as to the effect of the lien associated with the Missouri Health Net payments.

The record does not contain a filed fee agreement between claimant and claimant's attorney. K.S.A. 44-536(b) mandates that the written contract between the employee and the attorney be filed with the Director for review and approval. Should claimant's counsel desire a fee be approved in this matter, he must file and submit his written contract with claimant to the ALJ for approval.[16]

IT IS SO ORDERED.

Dated this ____ day of January, 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Mark E. Kolich, Attorney for Claimant
Samantha Benjamin-House, Attorney for Respondent and its Insurance Carrier
Marcia Yates Roberts, Administrative Law Judge

[16] K.S.A. 44-536(b).